



December 10, 1999

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Legal and Compliance Division
Texas Department of Insurance
333 Guadalupe Street
P.O. Box 149104
Austin, Texas 78714-9104

OR99-3591

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 130226.

The Texas Department of Insurance (the "department") received two requests for information regarding complaints against an insurance agent. You will provide some of the information to the requestors; however, you claim that the remaining information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.103 provides in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

* * *

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Section 552.103 excepts from disclosure information relating to litigation to which the state is or may be a party. The department has the burden of providing relevant facts and documents to show that the exception is applicable in a particular situation. As your letter acknowledges, the test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the requestor applies for the information, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under section 552.103. Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991). You explain that the department is engaged in an ongoing investigation of alleged violations of state insurance laws by the agent. You also explain that the department anticipates that the investigation will lead to an administrative contested case. In this instance, you have made the requisite showings that litigation is reasonably anticipated and that most of the requested information relates to that litigation.

However, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103 and must be released. Open Records Decision Nos. 349 (1982), 320 (1982). Several documents provided to this office as part of the requested information are letters to the individual who will be the opposing party or are documents created or signed by him. These are not protected by section 552.103 and generally must be released to any requestor. The documents required to be released are tagged.

Among the submitted documents are several actual annuity applications from individuals who dealt with the individual you are investigating. These would qualify as documents not excepted by section 552.103 because the opposing party has had access to them. However, they contain information which raises privacy concerns. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." That section encompasses information protected by common-law privacy. Common-law privacy excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

Prior decisions of this office have found that financial information relating to an individual ordinarily satisfies the first requirement of the test for common-law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an

individual and a governmental body. Open Records Decision Nos. 545 (1990), 373 (1983). This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under constitutional or common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). A public employee's allocation of his salary to a voluntary investment program offered by his employer is a personal investment decision, not one relating to the financial transaction between an individual and a governmental body, and is therefore excepted from disclosure by a common-law right of privacy. Open Records Decision No. 545 (deferred compensation plan). Therefore, you must withhold the annuity applications in their entirety.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

Ref: ID# 130226

Encl. Submitted documents

cc: Ms. Christina Thompson
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(w/o enclosures)

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